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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE KINSEL,

Petitioner,

v.

JACK WOLFE,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Hot Springs County, Wyoming And The Supreme Court, State Of Wyoming

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the mere allegation that a statement made by a Federal official in the course of his duties to a person outside the Government was slanderous deprive him of the absolute immunity of the doctrine of *Barr* v. *Matteo*, 360 U.S. 564 (1959)?

2. May a State Appellate Court refuse to review a denial of a claim of absolute immunity under Federal law from suit, on the ground that the Order effecting that denial is not "final"?

PARTIES TO THE PROCEEDINGS

1. Petitioner is George Kinsel. Mr. Kinsel was the Defendant in the District Court of Hot Springs County, Wyoming, and the Appellant in the Supreme Court of Wyoming.

2. Respondent Jack Wolfe was the Plaintiff in the District Court of Hot Springs County, Wyoming, and the Appellee in the Supreme Court of Wyoming.

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OCTOBER TERM, 1981

No. 81-

GEORGE KINSEL,

Petitioner,

v.

JACK WOLFE,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Hot Springs County, Wyoming And The Supreme Court, State Of Wyoming

---

PETITION FOR A WRIT OF CERTIORARI

George Kinsel petitions for a writ of certiorari to the District Court of Hot Springs County, Wyoming and the Supreme Court, State of Wyoming.

OPINIONS AND JUDGMENTS BELOW

The letter opinion of the District Court of Hot Springs County, Wyoming, of August 19, 1981, and the Order dated October 2, 1981 and entered on the docket on October 5, 1981 thereupon; and the letter denial of reconsideration dated October 28, 1981, and the Order dated and entered on the docket on November 10, 1981 thereupon appear, respectively at pp. 1a, 3a, 5a, and 6a of the Appendix to the Petition. None is reported.

The Order Dismissing Appeal of December 30, 1981, by the Supreme Court, State of Wyoming, and its Order Denying Reinstatement of January 26, 1982, appear, respectively, at pp. 8a and 10a of the Appendix. Neither is reported.

JURISDICTION

The Order of the District Court of Hot Springs County, Wyoming, was entered on October 5, 1981; a Motion for Reconsideration was filed on October 7, 1981, and denied by Order entered November 10, 1981.

Notice of Appeal to the Supreme Court, State of Wyoming, was filed on November 10, 1981. The Appeal was dismissed by Order entered on December 30, 1981. A Petition for Reinstatement was filed on January 21, 1982, and denied by Order of January 26, 1982.

By Order of March 22, 1982, Justice White extended the time for filing a petition for a writ of certiorari to and including May 29, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Inasmuch as the State Supreme Court has held that no right of appeal is available from a denial of a claimed absolute immunity from this suit under Federal law, Petitioner considers that the writ of certiorari is appropriately sought from the District Court, as "the highest court of a State in which a decision could be had," under 28 U.S.C. § 1257. Alternatively,[1] and in respect particularly to the second ques-

[1] This Court has on several occasions granted petitions for writs of certiorari directed in the alternative to a lower State Court and the State Supreme Court. *See, e.g., Local 24 of the International Brotherhood of Teamsters* v. *Oliver*, 356 U.S. 966 (1958), *opinion on the merits*, 358 U.S. 283 (1959); *Arnold* v. *Panhandle & Santa Fe Railway Co.*, 352 U.S. 820 (1956), *opinion on the merits*, 353 U.S. 360 (1957); *Chesapeake & Ohio Railway Co.* v. *Mihas*, 279 U.S. 827, *opinion on the merits*, 280 U.S. 102 (1929); *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Rock*, 278 U.S. 593

tion presented by this Petition, Petitioner seeks the writ from the Supreme Court, State of Wyoming.[2]

STATEMENT OF THE CASE

Petitioner George Kinsel at the times pertinent to this suit was a Supervisory Engineer in charge of the Themopolis, Wyoming, office of the United States Geological Survey, Department of the Interior. Respondent Jack Wolfe, a trucker of oil in the area, brought this slander action against Kinsel in the District Court of Hot Springs County, Wyoming, asserting that Kinsel had imputed to Wolfe the crime of "stealing oil."

Under Department of Interior regulations, rentals and royalties are payable to the United States Geological Survey on producing oil and gas leases on Federal land. *See* 43 C.F.R. § 3103.1-2. Royalties are payable "on the production removed or sold from leases," 43 C.F.R. § 3103.3-4. Petitioner Kinsel was responsible for supervising all oil and gas operational activities on Federal and Indian lands in his district, and for securing compliance with lease terms and applicable rules and regula-

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(1928), *opinion on the merits*, 279 U.S. 410 (1929). Although it is stated in R. Stern & E. Gressman, Supreme Court Practice (5th ed. 1978) ¶ 6.21 at 446, that this protective practice is not preferred, the cases cited do not appear to bear out that view. As here, there may sometimes be no satisfactory alternative, lest the substantial rights of the Petitioner be lost by counsel's understandable but faulty choice in an unclear situation.

[2] Under the Federal law applicable in this Court, a decision denying an absolute immunity is "final" for purposes of appealability, *e.g.*, *Helstoski* v. *Meanor*, 442 U.S. 500, 506-08 (1979), and cases cited in the text below at p. 9. Despite the fact that further State Court proceedings are contemplated by the Orders from which review is sought, they should therefore be deemed final for purposes of § 1257; "statutorily created finality requirements should, if possible be considered so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered . . . ." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976).

tions (Curtis Declaration ¶ 3).[3] Part of Kinsel's job "was to be sure that the oil and gas produced from Federal leases is properly handled, properly accounted for and the Government receives its royalty" (Kinsel Dep. Tr. 27).

On March 27, 1980, Kinsel received a telephone call from a Geological Survey field technician under his supervision, concerning the removal of oil from a well leased by the Altus Exploration Company. The field technician reported that he had been at the well; that oil was being removed from the location; and that he could not be sure "which direction all these trucks were going from the location, if all the oil was being hauled where it was supposed to go" (Kinsel Dep. Tr. 14). The field technician further advised Kinsel that he had had a heated discussion with Respondent Wolfe, who had insisted that it was "none of the Government's business where the oil was going" (*id.* 19).

Upon receiving this information, Kinsel called the offices of Altus Exploration Company in Denver, and reached one Elmer Herbaly (*id.* 13). Kinsel advised Herbaly of the information received from the field technician, and stated that he was rescinding a limited oral approval he previously had given to haul oil off the lease to be stored and separated. He requested Herbaly to cause the well to be shut down (*id.* 19). Wolfe's Complaint is based on the assertion, denied by Kinsel (*id.* 17-18), that Kinsel in this conversation with Herbaly imputed the stealing of oil to Wolfe.

Kinsel moved to dismiss or for summary judgment on the ground that he was absolutely immune from a defamation suit based upon actions taken within the general

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[3] Charles Curtis, the Area Oil and Gas Supervisor, United States Geological Survey, in Casper, Wyoming, was Kinsel's immediate supervisor. His Declaration referred to in the text was filed in support of Kinsel's Motion to Dismiss or in the Alternative for Summary Judgment.

scope of his official duties, under the doctrine of *Barr* v. *Matteo*, 360 U.S. 564 (1959). In support of the motion he filed Declarations of himself and his immediate superior, and his official position description which states, *inter alia*:

> "Within a broad framework of policy and planning set forth by the Regional Oil and Gas Supervisor and his principal assistants, incumbent serves as technical and administrative head of an independent field office. Incumbent is responsible for planning, executing, and monitoring the progress of programs of this field office. Incumbent regularly renders decisions on problems for which there is no available precedent and guideline and is often called upon to apply studied, mature, scientific judgment in reaching conclusions on novel and unusual situations and/or problems. Many decisions made by incumbent are, of necessity, on-the-spot decisions that can only be reviewed by the Supervisor after-the-fact. Improper decisions can result in the loss of thousands of dollars of the Federal lease holder."

In opposition to the motion, Plaintiff filed a one-paragraph affidavit of Herbaly asserting that in the telephone conversation, Kinsel had said that the trucker was stealing oil, and Herbaly associated Wolfe as the sole managing executive of the trucking company. Plaintiff submitted no evidence to the effect that Kinsel's activities were outside the scope of his duties.

On August 19, 1981, the District Court issued a letter opinion (Pet. App. 1a), stating that Kinsel's motion would be denied. It reasoned as follows:

> "I have no problem with *Barr v. Matteo* and the holding that absolute immunity attaches but I feel that the principle would only apply in the case of a government employee (i.e. Kinsel in the instant case) when such employee was making a report to a superior or to another employee. Granted, the purpose of the phone call by Kinsel to Herbaly concerned

> an oil problem which fell within the scope of Defendant's employment, but the alleged slanderous statement concerning the Plaintiff made to Herbaly falls in my opinion beyond the ambit of his employment. The statement to Herbaly transcends not only the outer perimeter of Kinsel's duties but I fail to see that such a remark to a third person can be considered an appropriate exercise of discretion with full immunity afforded Kinsel."

An Order denying the motion was entered on October 5, 1981. This Order states "that no absolute privilege should be afforded Defendant, but only a qualified privilege as indicated in the dissenting opinion in Barr -vs- Mateo [sic] by Mr. Justice Brennan . . ." (Pet. App. 3a). After a motion for reconsideration was denied on November 10, 1981 (Pet. App. 6a), Kinsel noted an appeal to the Supreme Court of the State of Wyoming. That Court, *sua sponte*, on December 30, 1981, entered an Order Dismissing Appeal on the ground that the Order appealed from was not a final Order (Pet. App. 8a). Kinsel filed a Petition for Reinstatement, based on the ground that where an absolute immunity from suit is asserted and denied, the Order is indeed final. Reinstatement was denied in an Order of January 26, 1982 (Pet. App. 10a), stating:

> "The Court, having carefully considered the matter, concludes that it is not subject to any prevailing federal rule for interlocutory appeal asserted."

REASONS FOR GRANTING THE WRIT

In two separate respects, the State Courts of Wyoming have failed to recognize the rights of a Federal employee under well-settled Federal law. First, the refusal to dismiss this suit was flatly irreconcilable with the decision in *Barr* v. *Matteo*, 360 U.S. 564 (1959). The reasoning that a communication otherwise within the outer perimeter of a Federal employee's duties loses that character merely because it is made to someone outside

the Government or merely because it is alleged to be tortious, is refuted by *Barr* itself, and by the companion case of *Howard* v. *Lyons*, 360 U.S. 593 (1959), both themselves defamation suits. Second, the refusal of the Wyoming Supreme Court, on the ground of non-finality, to entertain an appeal from an Order effectively negating a claim of absolute privilege of a Federal employee is an invalid refusal to recognize Federal law. In this respect, too, the rulings below do not conform to the leading decisions of this Court, which require that a State Court provide a procedural means for the protection of rights under Federal law. *E.g.*, *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952).

In each respect, the rulings below present important questions of Federal law of a kind reviewed regularly by this Court.

I. THE COURTS BELOW FAILED TO FOLLOW CONTROLLING DECISIONS OF THIS COURT.

Barr v. *Matteo* and *Howard* v. *Lyons* leave no room for doubt that Petitioner Kinsel is absolutely immune from this slander action.[4] Unquestionably his calling a lessee concerning the movement from Federal lands of oil, on which royalties were payable to the United States, was well "within the outer perimeter of Petitioner's line of duty" as a United States Geological Survey supervisory engineer. *Barr*, 360 U.S. at 575. The ruling of the lower Court that those leading decisions establish absolute immunity only for communications within the Government is directly contrary to their holdings. *Barr* and *Howard* were themselves defamation actions based upon communications by Federal officials with persons

[4] As this suit is not based on any alleged Constitutional violation, the immunity plainly is an absolute, not merely qualified, one. *Butz* v. *Economou*, 438 U.S. 478, 494-95 (1978); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, 566 F.2d 289 (D.C. Cir. 1977) (*en banc*), *cert. denied*, 438 U.S. 915 (1978); *Evans* v. *Wright*, 582 F.2d 20 (5th Cir. 1978).

outside the Government. The lower Court apparently recognized that it was disregarding this clear authority of this Court, for it relied on the dissenting opinion in *Barr*, rather than the opinion of this Court. Manifestly, there is a clear-cut failure to follow the rulings of this Court on a matter of Federal law.[5]

Likewise, the theme of the ruling denying immunity here, that the communication was not privileged if it was wrongful, was specifically rejected in *Barr*, 360 U.S. at 572. This Court quoted with approval from *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950), on this very point:

> ". . . it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine."

The problem of damage suits against Federal officials is a continuing and important one. The Assistant Attorney General for the Civil Division, Department of Justice, has estimated that approximately 7,500 to 10,000 such suits have been filed in the past 11 years.[6] Whether or not such suits are dismissable without trial when

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[5] The present case indeed is a far clearer one for absolute immunity than *Barr* and *Howard*. The communication here was to a single recipient; in *Barr* it took the form of a press release, and in *Howard* a communication with the media. Moreover, there was no suggestion that the defendants in those cases were required to make the communication; Kinsel might well have been deemed derelict in his duties had he failed to communicate with the oil lessee in the face of the information he received. Accordingly, his action was not only within the "outer perimeter" of his duties, but at their core.

[6] Press Release of J. Paul McGrath, Department of Justice, March 31, 1982, to be published in *Proposed Amendments to the Federal Tort Claims Act: Hearings on S. 1775 Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

based on alleged common law torts is a matter of great significance in judicial administration as well as in the conduct of Government activities.

II. THE STATE COURTS MUST GIVE EFFECT TO FEDERAL LAW; AND CANNOT DEFEAT AN ABSOLUTE IMMUNITY UNDER THAT LAW BY CHARACTERIZING ITS DEFEASANCE AS NON-FINAL.

The *Barr* doctrine is one of "peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States." *Howard* v. *Lyons*, 360 U.S. at 597. It is equally clear that one facet of this Federal law is that the protection is one against "*suits* which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Barr*, 360 U.S. at 571 (emphasis added). Absolute immunity protects defendants " 'not only from the consequences of litigation's results but also from the burden of defending themselves.' " *Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U.S. 719, 732 (1980) (quoting *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967)).

For this reason, it has been uniformly recognized that an order denying a Federal absolute immunity defense is "final" and appealable immediately. *Helstoski* v. *Meanor*, 442 U.S. 500, 506-08 (1979) (Speech or Debate Clause); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1207-09 (3d Cir. 1979), *cert. denied sub nom. Mitchell* v. *Forsyth*, 453 U.S. 913 (1981) (*Barr* immunity); *Dellums* v. *Powell*, 660 F.2d 802, 804 (D.C. Cir. 1981) (*Barr* immunity).[7]

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[7] A similar issue concerning a suit brought in federal district court has been raised in *Nixon* v. *Fitzgerald* and *Harlow* v. *Fitzgerald, cert. granted*, 452 U.S. 959 (1981) (Nos. 79-1738, 80-945).

Petitioner submits that the State Courts cannot fail to apply such a Federal privilege by labelling defeasance of the Federal protection against suit "non-final"—which it would not be under the standards of Federal law described above. This Court has consistently refused to be bound by state procedural rules when their application would frustrate Federal rights and privileges. *E.g.*, *Brown* v. *Western Railway of Alabama*, 338 U.S. 294 (1949) (rule construing pleadings against the pleader); *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (right to jury trial); *Wright* v. *Georgia*, 373 U.S. 284 (1963) (rule requiring explicit identification of arguments in appellate briefs); *Chapman* v. *California*, 386 U.S. 18 (1967) (harmless error rule). Of course, "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless . . . the state rule is in conflict with federal law." *Ferri* v. *Ackerman*, 444 U.S. 193, 198 (1979). But "considerations of state law may be displaced where their application would be inconsistent with . . . federal policy . . . ." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 465 (1975). Indeed, "federal courts must be ever vigilant to insure that application of state law poses 'no significant threat to any identifiable federal policy or interest . . . .'" *Burks* v. *Lasker*, 441 U.S. 471, 479 (1979) (quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966)).

In the present case, the Wyoming rule treating the denial of Petitioner Kinsel's immunity claim as non-final[8] undercuts the fundamental purpose of the im-

[8] Under other circumstances, such as the granting by the state district court of a temporary injunction, the Wyoming Supreme Court has treated an interlocutory order as "final" for purposes of immediate appeal. *See* Note, *The Right to Appeal in Wyoming*, 18 Wyo. L.J. 61, 62-63 (1963). Wyoming Rule of Appellate Procedure 1.05 defines a final order, *inter alia*, to include "an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment." Even if this

munity privilege: "that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits . . . ." *Barr*, 360 U.S. at 571. Even if Kinsel were to prevail on the merits of his defense, the Wyoming Supreme Court's decision would have forced him to endure the burden and expense of a needless trial. The Petitioner's rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it . . . ." *Lawrence* v. *State Tax Commissioner of Mississippi*, 286 U.S. 276, 282 (1932).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 1982

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definition did not on its face require a holding that the Order at issue here was final, it left ample room to respect the Federal right asserted by considering an immediate appeal. Thus, if a motion for temporary injunctive relief is considered a "special proceeding" for appeal purposes in Wyoming practice, as it is, there was no apparent reason why one raising a claim of absolute privilege from trial could not equally have been so considered.

APPENDIX

THE STATE OF WYOMING
FIFTH JUDICIAL DISTRICT

August 19, 1981

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Ms. Esther I. Estryn
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Jack Wolfe vs. George Kinsel
Civil No. 7146, Hot Springs County, Wyo.

Dear Counsel:

The Defendant contends that even if the Defendant said what Plaintiff alleges the Defendant to have said (i.e. to the effect "that the Plaintiff was stealing oil") that said utterance was made under absolute immunity. Defendant argues that the absolute immunity existed because the phone call in which the slanderous remark was allegedly made was placed by the Defendant to a lease holder concerning oil on said lease and by reason of such the conversation fell within the perimeter of Defendant's employment. Defendant cites *Barr* v. *Matteo* and numerous federal cases contending the question of immunity is judged by federal standards.

I have no problem with *Barr* v. *Matteo* and the holding that absolute immunity attaches but I feel that the principle would only apply in the case of a government employee (i.e. Kinsel in the instant case) when such employee was making a report to a superior or to another employee. Granted, the purpose of the phone call by Kinsel to Herbaly concerned an oil problem which fell

within the scope of Defendant's employment, but the alleged slanderous statement concerning the Plaintiff made to Herbaly falls in my opinion beyond the ambit of his employment. The statement to Herbaly transcends not only the outer perimeter of Kinsel's duties but I fail to see that such a remark to a third person can be considered an appropriate exercise of discretion with full immunity afforded Kinsel.

If the remark was made by the Defendant then it was not an appropriate exercise of the discretion with which an employee of Kinsel's rank or even a person of executive rank is necessary clothed to make. I hold that there is no absolute privilege afforded Kinsel but only a qualified privilege. As stated by Justice Brennan in a dissent opinion in *Barr* v. *Matteo*, "It would protect the government officer unless it appeared on trial that his communication was (a) defamatory, (b) untrue, and (c) malicious."

Finding there are material issues of fact to be determined, I hold the matter should not be dismissed nor Summary Judgment granted.

Thus, the Defendant's Motion To Dismiss or in the alternative Defendant's Motion For Summary Judgment should be denied.

Mr. Sperry will prepare an order in conformance with the above and submit it to Ms. Estryn for her approval as to form and then to the Court for signature.

Very truly yours,

/s/ Harold Joffe
HAROLD JOFFE
District Judge

HJ:sg

IN THE DISTRICT COURT
OF HOT SPRINGS COUNTY, WYOMING
FIFTH JUDICIAL DISTRICT

Civil Action No. ———

JACK WOLFE,

Plaintiff,

-vs-

GEORGE KINSEL,

Defendant.

ORDER

THE ABOVE ENTITLED MATTER coming regularly before the Court on August 5, 1981, upon the Motion of Defendant entitled Motion To Dismiss Or In The Alternative For Summary Judgment, and the Court having heard and considered the evidence adduced in connection therewith and having heard and considered the presentations of counsel and being now fully advised, the Court finds that the Motion of Defendant to dismiss is based on the contention of Defendant that absolute immunity existed for Defendant and the Court finding that no absolute privilege should be afforded Defendant, but only a qualified privilege as indicated in the dissenting opinion in Barr -vs- Mateo by Mr. Justice Brennan and the Court further finding that there are material issues of fact to be determined precluding the granting of Summary Judgment to Defendant and that therefore the said Motion To Dismiss and the Motion For Summary Judgment should be denied;

IT IS, THEREFORE, ORDERED BY THE COURT THAT: Defendant's Motion To Dismiss Or In The Alternative For Summary Judgment should be, and it hereby is, denied. Defendant shall have the period of 30 days from the date of this Order in which to answer or otherwise plead herein.

DATED at Worland, Wyoming this 2 day of October, 1981.

/s/ Harold Joffe
District Judge

Approved as to Form But Otherwise Objected to:

/s/ Esther I. Estryn
MS. ESTHER I. ESTRYN
Attorney for Defendant

THE STATE OF WYOMING
FIFTH JUDICIAL DISTRICT

October 28, 1981

Ms. Esther I. Estryn
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Jack Wolfe vs. George Kinsel
Civil No. 7146, Hot Springs County, Wyo.

Dear Counsel:

I find nothing in the Defendant's Motion For Reconsideration which would make this Court reconsider its decision on the defense of absolute immunity and I hold that there is no need for oral argument on said issue.

It is your decision whether to appeal such ruling.

Very truly yours,

/s/ Harold Joffe
HAROLD JOFFE
District Judge

HJ:sg

cc: Mr. James H. Sperry
Mr. Ronald P. Jurovich

IN THE DISTRICT COURT
OF HOT SPRINGS COUNTY, WYOMING
FIFTH JUDICIAL DISTRICT

Civil Action No. 7146

JACK WOLFE,

Plaintiff,

vs.

GEORGE KINSEL,

Defendant.

ORDER

This matter having come before the Court initially on Defendant's Motion to Dismiss or in the alternative for Summary Judgment and Counsel having been heard on said Motion and subsequently on Defendant's Motion for Reconsideration, and the Court being fully advised in the premises, it is this 10th day of November, 1981, hereby

FINALLY ORDERED that Defendant's request for oral arguments on Defendant's Motion for Reconsideration is denied, and it is further

FINALLY ORDERED that Defendant's Motion to Dismiss or in the alternative for Summary Judgment based upon absolute immunity and Defendant's Motion for Reconsideration of the Courts Order dated October 2, 1981, be and hereby is denied.

/s/ Harold Joffe
HAROLD JOFFE
District Judge

IN AND FOR HOT SPRINGS COUNTY
RECORD OF FEES

Date 1981	Clerk's Fees—Papers Filed	Plaintiff Dr.	Plaintiff Cr.	Defendant Dr.	Defendant Cr.
Feb. 13	James H. Sperry		25.00	L.E.W.	
Feb. 13	Complaint				
Feb. 13	Summons Issued				
Mar. 19	Entry of Appearance				
April 2	Summons Returned				
April 3	Stipulation for Enlargement of Answer Time				
April 3	Order				
May 27	Notice of Motion [Defendant's Motion to Dismiss or in the Alternative for Summary Judgment]				
June 24	Subpoena—George Kinsel				
June 24	Subpoena—George Campbell				
June 24	Subpoena—George Havene				
June 24	Notice of Taking Deposition				
June 24	Notice of Taking Deposition				
June 24	Notice of Taking Deposition				
July 30	Subpoena—(George Campbell)				
July 28	Notice of Motion				
Aug. 4	Answers to Motion				
Aug. 5	Copy of letter to Mr. Justice for Janet Federiken				
Sept. 23	Notice of Setting				
Oct. 5	See Letter to Judge Joffe				
Oct. 5	Order				
Oct. 7	Notice of Motion [Defendant's Motion for Reconsideration]				
Nov. 10	Order				
Nov. 10	Notice of Appeal—Designation of Record				

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1981

No. 5635

GEORGE KINSEL,

Appellant
(Defendant),

v.

JACK WOLFE,

Appellee
(Plaintiff).

ORDER DISMISSING APPEAL

It appears from the record that on October 5, 1981, the district judge entered an order denying appellant's motion to dismiss or in the alternative for summary judgment. The appellant then moved the district court for reconsideration, which was denied by the district judge by order entered on November 10, 1981, which also recited:

> "FINALLY ORDERED that Defendant's Motion to Dismiss or in the alternative for Summary Judgment based upon absolute immunity and Defendant's Motion for Reconsideraiton of the Court's Order dated October 2, 1981, be and hereby is, denied."

It is from this latter order that appellant has taken this appeal.

It is firmly established that this court will not entertain piecemeal appeals, Knudson v. Hilzer, Wyo., 551 P.2d 680 (1976); Snell v. Ruppert, Wyo., 541 P.2d 1042 (1975). A judgment or order which determines the merits of the controversy and leaves nothing for future consideration is final and appealable, and it is not appealable unless it

does those things, Public Service Commission v. Lower Valley Power and Light, Inc., Wyo., 608 P.2d 660 (1980); Arp v. State Highway Commission, Wyo., 567 P.2d 736 (1977).

The court finds that the order appealed from is not a final order within the purview of Rule 1.05, W.R.A.P.

Upon its own motion, the court

ORDERS that the captioned appeal be, and is, dismissed.

December 30, 1981.

By the Court

/s/ Robert R. Rose, Jr.
ROBERT R. ROSE, JR.
Chief Justice

IN THE SUPREME COURT
STATE OF WYOMING

OCTOBER TERM, A.D. 1981

No. 5635

GEORGE KINSEL,

Appellant
(Defendant),

v.

JACK WOLFE,

Appellee
(Plaintiff).

ORDER DENYING REINSTATEMENT

The court, having carefully considered the matter, concludes that it is not subject to any prevailing federal rule for interlocutory appeal asserted.

It is, therefore,

ORDERED that appellant's Petition for Reinstatement be, and is, denied.

January 26, 1982.

By the court

/s/ Robert R. Rose, Jr.
ROBERT R. ROSE, JR.
Chief Justice

Questions Presented

1. Should this Court issue a Writ of Certiorari to the Wyoming District Court?
2. Does qualified immunity for executive officials protect the public's interest in effective functioning of government?
3. Can a state appellate court define its own procedures for state causes of action?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2195

GEORGE KINSEL,

Petitioner,

v.

JACK WOLFE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF HOT SPRINGS COUNTY, WYOMING AND THE SUPREME COURT, STATE OF WYOMING

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

Opinions Below

The letter opinion of the District Court of Hot Springs County, Wyoming, of August 19, 1981, and the Order dated October 2, 1981, and entered on the docket on October 5, 1981, thereupon; and the letter denial of reconsideration dated October 28, 1981, and the Order dated and entered on the docket on November 10, 1981, thereupon appear, respectively at 1a, 3a, 5a, and 6a of the Appendix to the Petition for a Writ of Certiorari and are incorporated herein by reference. None is reported.

The Order Dismissing Appeal of December 30, 1981, by the Supreme Court, State of Wyoming, and its Order Denying Reinstatement of January 26, 1982, appear respectively at 8a and 10a of the Appendix to the Petition and are incorporated herein by reference. Neither is reported.

Jurisdiction

The Order of the District Court of Hot Springs County, Wyoming was entered on October 5, 1981; a Motion for Reconsideration filed on October 7, 1981, was denied by Order entered November 10, 1981.

Notice of Appeal to the Supreme Court, State of Wyoming, was filed on November 10, 1981. The Appeal was dismissed by Order entered on December 30, 1981. A Petition for Reinstatement was filed on January 21, 1982, and denied by Order of January 26, 1982.

By Order of March 22, 1982, this Court extended the time for filing a petition for a Writ of Certiorari to and including May 29, 1982.

The jurisdiction of this Court to review the decision of the District Court of Hot Springs County, Wyoming is founded upon 28 U.S.C. § 1257(3).[1] Under state law, the judgment of the Wyoming District Court is not subject to discretionary interlocutory review. (Pet. App. at 10a.) Nor is the Wyoming District Court Order of October 2, 1981, a final order subject to appeal under Rule 1.05 of the Wyoming Rules of Appellate Procedure. (Pet. App. at 8a-9a.) Therefore, the Wyoming District Court's judgment is that of the highest court of the state in which decision

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[1] 28 U.S.C. § 1257(3) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

could be had. *See, e.g., Faretta v. California*, 422 U.S. 806, 812 (1975); *Minneapolis, St. P & S. Ste. M. Ry. v. Rock*, 279 U.S. 410, 411-12 (1929); *Virginian Ry. v. Mullens*, 271 U.S. 220 (1925).

Statement of the Case

Petitioner, George Kinsel, at the times pertinent to this suit, was employed as a supervisory petroleum engineer in charge of the Thermopolis, Wyoming office of the United States Geological Survey (USGS), Department of Interior. (Complaint at 1.) Respondent, Jack Wolfe, is the sole manager of C.L. Bayne Trucking, Worland, Wyoming. (Complaint at 1.) C.L. Bayne Trucking is engaged in a general oil field trucking and hauling business. (Complaint at 1.) At the end of March, 1980, there was a minor oil spill at an Altus Exploration well location. Altus contracted with Wolfe's company to skim this oil off the pit. While a truck driver employed by Wolfe was skimming the pit, one of Kinsel's field technicians appeared and asked where the oil was going. (Kinsel Dep. Tr. at 14.) Wolfe's driver said he did not know because he had been told to call his employer on the radio when he finished skimming to find out the destination of the oil.

Jack Wolfe arrived on the scene and spoke with the field technician. The technician then called Kinsel to tell him that oil was being transported to some unknown location by Wolfe's company. (Kinsel Dep. Tr. at 14.) In response to this phone call, Kinsel promptly telephoned the Denver office of Altus Exploration, the lessee of the well, to notify it of his decision to rescind a limited oral approval he previously had given to haul oil off the lease. (Kinsel Dep. Tr. at 14.) During this call, he spoke with Elmer Herbaly, an Altus employee, informing him of the field technician's report ad requesting him to shut down the well. Wolfe claims that it was during this discussion that Kinsel slandered him by telling Herbaly that Wolfe had stolen the oil. (Complaint at 2.)

Wolfe filed a slander action against Kinsel in the District Court of Hot Springs County, Wyoming. Kinsel responsed that,

as a government official, he was cloaked with absolute immunity from suit because his actions, in conversing with Herbaly, were within the scope of his official duties under the doctrine of *Barr v. Matteo*, 360 U.S. 564 (1959). Kinsel moved for dismissal or for summary judgment. Wolfe opposed Kinsel's motion by submitting Herbaly's affidavit, which supports the claim that Wolfe had indeed been slandered by Kinsel.

On August 19, 1981, District Judge Harold Joffe issued a letter opinion stating that he would deny Kinsel's motion. (Pet. App. at 1a-2a.) The Judge found that absolute immunity would apply only in the case of a government employee making a report to another gvernment employee or his supervisor. The Judge felt that the conversation with Herbaly constituted a discussion with a third person and was, therefore, outside of the ambit of Kinsel's duties.

On October 2, 1981, Judge Joffe issued his Order denying Kinsel's motion. (Pet. App. at 3a-4a.) The Judge stated that Kinsel was entitled only to a qualified privilege, citing Justice Brennan's dissenting opinion in *Barr*.

Kinsel's motion for reconsideration was denied on November 10, 1981. (Pet. App. at 6a.) He then appealed to the Wyoming Supreme Court. This appeal was dismissed on De mber 30, 1981, on the ground that Judge Joffe's Order was not final. (Pet. App. at 8a-9a.) Kinsel filed a Petition for Reinstatement, asserting that when a claim for absolute immunity is denied, the order is final for purposes of appeal. This petition was denied by Order of January 26, 1982. (Pet. App. at 10a.) The Wyoming Supreme Court denied the petition stating that it was not subject to any prevailing federal rule for interlocutory appeal.

Argument

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO THE WYOMING DISTRICT COURT

This case offers the Court an opportunity to provide essential clarification on the otherwise confusing law of governmental

immunity. For that reason, the Court should issue the Writ to the District Court of Hot Springs County, Wyoming and affirm its judgment with instructions and guidelines for similar cases.

As the law now stands, the Wyoming District Court opinion is the clearest authoritative statement on the precise issue of the case — whether lower level government officials may be held liable for tortious conduct. (Pet. App. at 1a-2a.) Although this Court has recently developed a sophisticated body of law dealing with governmental immunity for alleged constitutional injury, *e.g.*, *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the last case deciding the extent of immunity for tortious conduct is *Barr v. Matteo*, 360 U.S. 564 (1959). Although *Barr* has not been explicitly overruled, the opinion is confusing and has been significantly eroded by subsequent cases passing upon the scope of immunity for constitutional injury.

Barr was a plurality opinion, authored by Justice Harlan and joined by Justices Frankfurter, Clark and Whittaker. Justice Black concurred in the result, and Chief Justice Warren, Justices Douglas, Brennan and Stewart dissented. Justice Harlan's plurality opinion does not stand for absolute immunity, as petitioner argues. Instead, the plurality maintains that government officials are immune from tort liability as long as they are acting "within the outer perimeter of [their] line of duty. . . ." 360 U.S. at 575. Thus, even under *Barr*, it is a factual question whether the official was acting within the scope of his duty. Summary judgment in the official's favor would rarely be appropriate, since he has *no* immunity, either qualified or absolute, if acting outside the scope of his duty.

If *Barr* is assumed to stand for absolute immunity, it is uncertain whether the plurality's views are any longer the law. For example, this Court in *Wood v. Strickland*, 420 U.S. 308 (1975), held that government officials were immune from liability unless they knew or reasonably should have known that their actions would result in a constitutional deprivation *or other injury*.

420 U.S. at 322 (emphasis added). Because "other injury" obviously includes torts, it is arguable that the plurality view of *Barr* has been implicitly replaced by a qualified immunity standard as advocated by Justice Brennan's dissent in *Barr*. In any event, there is no clear holding on the issue and this Court should accordingly provide some definitive guidance.

II. THE WYOMING DISTRICT COURT APPLIED THE APPROPRIATE IMMUNITY STANDARD

Barr v. Matteo, 360 U.S. 564 (1959) and *Howard v. Lyons*, 360 U.S. 593 (1959) should be limited to the specific facts of those cases. In *Barr*, the official involved was acting director of a federal agency. This Court found that a publicly expressed statement, by the head of an agency announcing personnel actions he planned to take, was an appropriate exercise of discretion. According to the Court, an officer responsible for making policy must possess such discretion if the agency is to function effectively. 360 U.S. at 574-75. Likewise, in *Howard v. Lyons*, this Court observed that it was part of the federal officer's official duties to send copies of the report at issue to members of the Massachusetts Congressional delegation. 360 U.S. at 597.

In the present case, the Wyoming District Court found that Kinsel's remark was beyond the outer perimeter of his official duties and was not an appropriate exercise of discretion. (Pet. App 2a.) That factual determination is significant because it is "the relation of the act complained of to matters committed by law to [the] control or supervision" of the official which determines the extent of his immunity from civil defamation suits. *Barr*, 360 U.S. at 573-574. This statement suggests that "in varying scope, a *qualified* immunity is available to officers of the executive branch of government [depending upon] the scope of discretion and responsibilities of the office...." *Scheuer v. Rhodes*, 416 U.S. at 247 (emphasis added).

Moreover, this case should be analyzed in light of the current trend in immunity law conferring upon most executive officials a qualified immunity. *Butz v. Economou*, 438 U.S. 478 (1978). The

test for qualified immunity for state executive officials was enunciated in *Wood v. Strickland*, 420 U.S. 308 (1975). Such officials were immune from liability unless they knew or reasonably should have known that their actions would result in a constitutional deprivation or other injury. 420 U.S. at 322.

It is apparent from *Wood* and *Scheuer*, that this Court envisioned the test for immunity as applying to injuries other than constitutional violations. To argue for two tests — one for constitutional injury and one for torts — is inconsistent. The "two test" system gives an executive official absolute protection from liability for his tortious conduct unless a plaintiff artfully pleads his injury as a constitutional wrong, thereby gaining the advantage of the qualified immunity standard. There is no principled reason for such an inconsistency. An individual has no less a right to redress because the infringement could not be pleaded in constitutional terms.

In *Butz v. Economou*, 438 U.S. at 507-08, this Court found that federal executive officials were entitled to only a qualified immunity, recognizing that a blanket holding of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials. One of the major concerns in *Butz* was insuring that executive officials would not be subject to vexing litigation for actions taken in the performance of their official duties. However, the way to minimize the burdens of litigation does not generally lie through the abolition of a right of redress for an admitted wrong. *Barr*, 360 U.S. at 589 (Brennan, J., dissenting). Qualified immunity adequately protects the public's interest in the effective functioning of government and is the best attainable accomodation of competing values. *Harlow v. Fitzgerald*, 102 S. Ct. at 2738; *Butz v. Economou*, 438 U.S. at 507-08; *Scheuer v. Rhodes*, 416 U.S. at 245-48.

The public interest is not only in limiting defamation suits against government officials. The public also has a profound interest in preserving the opportunity to criticize the administration of our government. Indeed, as Chief Justice Warren noted in his dissenting opinion in *Barr*:

> [I]t will take a brave person to criticize government officials knowing that in reply they may libel him with immunity in the name of defending the agency and their position.

360 U.S. at 585.

Barr v. Matteo and *Howard v. Lyons* underscore this Court's concern about inquiring into an executive officer's motives for taking certain official action. In order to quickly terminate insubstantial lawsuits, this Court revised the *Wood v. Strickland* qualified immunity test to avoid judicial inquiry into the subjective motivation of an official claiming qualified immunity. *Harlow v. Fitzgerald*, 102 S. Ct. at 2736-38. Thus, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow*, 102 S.Ct. at 2738.

This reasoning should be extended to suits for defamation against executive officials. Kinsel's utterances would, therefore, be protected by qualified immunity as long as they did not infringe upon clearly established common law rights. In fact, in many cases it is far easier to comprehend tortious conduct than it is to determine what constitutes a constitutional violation. No inquiry would be made at the summary judgment stage into Kinsel's subjective motivation for making defamatory statements about Wolfe. It would only be necessary to inquire into whether there was a clearly established right which was violated by Kinsel's actions.

. This approach would avoid applying a shifting standard of immunity for executive officials depending upon the violation

alleged in the complaint. Executive conduct could then be guided by the long line of cases setting out the standards for qualified immunity.

III. WYOMING MAY ADOPT ITS OWN PROCEDURAL RULES TO GOVERN STATE CAUSES OF ACTION

The rule at common law was that there could be no appeal except from a final judgment, which was defined as one that disposed of all the issues as to all the parties. *Collins v. Miller*, 252 U.S. 364 (1920). Wyoming has defined a final judgment as one which determines the merits of the controversy and leaves nothing for future consideration. *Public Service Commission v. Lower Valley Power and Light*, 608 P.2d 660 (Wyo. 1980). It is a firmly established rule of Wyoming procedure to avoid entertaining piecemeal appeals. *Knudson v. Hilzer*, 551 P.2d 680 (Wyo. 1976).

Similarly, Justice Frankfurter observed that permitting appeals from interlocutory orders would result in delay: "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). This statement parallels a federal policy against piecemeal appeals. Congress has limited appeals to "final decisions", 28 U.S.C. § 1291, and interlocutory orders falling within four narrow categories. 28 U.S.C. § 1292 (1976).

Petitioner, on the other hand, claims that the Wyoming courts must follow the federal rules relating to interlocutory appeals because he is asserting a federal defense to a state claim. In response to such an argument, this Court has recognized that:

> When federal law is the source of the plaintiff's claim, there is a federal interest in defining the defense to that claim, including the defense of immunity. (Citations omitted.) That interest, of course, is not present in a case, such as this, arising under state law.

Ferri v. Ackerman, 444 U.S. 193, 198 n.13 (1979).

No. 81-2195

Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE KINSEL,

Petitioner,

v.

JACK WOLFE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF HOT SPRINGS COUNTY, WYOMING AND THE SUPREME COURT, STATE OF WYOMING

RESPONSE TO PETITION FOR WRITS OF CERTIORARI

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Counsel For Respondent

October 4, 1982

Respondent's claim, in this case, is based on state law. Hence, state courts need not ignore their own procedures simply because a federal defense is asserted. Requiring state courts to apply federal procedural rules where a state cause of action is asserted would contravene states' Tenth Amendment right to establish their own judicial systems.

Conclusion

The Petition for a Writ of Certiorari to the District Court of Hot Springs County, Wyoming should be granted. The Petition for a Writ of Certiorari to the Supreme Court, State of Wyoming should be denied.

Respectfully submitted,

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Counsel For Respondent

October 4, 1982

Certificate of Service

I hereby certify that on this 1st day of October, 1982, I placed in the United States Mail, postage prepaid the foregoing Response to Petition for Writs of Certiorari to the following parties:

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